



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT CORPS OF ENGINEERS
333 MARKET ST.
SAN FRANCISCO, CALIFORNIA 94107

June 28, 2002

Office of Counsel

William C. Britt
Vice President
Cargill, Inc.
P. O. Box 5724-Lake Office
Minneapolis, Minnesota 55440-5724

Dear Mr. Britt:

This responds to your letter dated June 26, 2002, regarding the way in which the U.S. Army Corps of Engineers would evaluate an application from Cargill for a Rivers and Harbors Act and/or Clean Water Act permit at Cargill's Redwood City Plant Site. The Corps appreciates the willingness of Cargill to engage in the permitting process regarding its plans at the Redwood City Plant Site. We recognize that Cargill is convinced that this property is not subject to regulation under either Act. The Corps believes that the public interest is not best served by litigation regarding these matters, if the opportunity exists to achieve a superior environmental result that meets Cargill's development needs through the permit process.

As you are aware, the Corps is neither the proponent nor the opponent of any permit application. The Corps ultimately will make its decision regarding the development of this property following the complete development of an administrative record through the public review process.

In order to assist project proponents and the public in the Corps permit process, the Corps encourages project proponents to engage in the pre-application consultation process. A primary goal of the pre-application process is to provide the project proponent with all helpful information necessary in pursuing the application, including factors that the Corps must consider in its permit decision making process. This information is intended to assist the project proponent in evaluating the viability of alternatives it is considering. The Corps considers Cargill's inquiry as an initial step in the pre-application process and offers the following information for Cargill to consider.

Generally speaking, in deciding whether to grant or deny permits, the Corps must evaluate the impact of a proposed project on the public interest, applying the criteria set forth in its regulations for making this determination. Under these regulations, a permit will be granted unless the Corps determines that it would be contrary to the public interest. Among other things, the Corps is required to give great weight to state and local decisions. The Corps' regulations recognize that the primary responsibility for determining zoning and land use matters rests with state and local governments. The

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Corps normally accepts such decisions on these matters unless there are significant issues of overriding national importance [which must be identified in the Corps' decision documents – see 33 C.F.R. § 325.2(a)(6)]. With regard to the Redwood City Plant Site, Cargill's proposed development of the site will be a significant land issue for local planning authorities. Local planning decisions regarding the future of this site will be a key consideration in the Corps' evaluation of the public interest for the proposed project.

In addition, regarding permits under the Clean Water Act, the Corps must determine whether the proposed activity complies with the Section 404(b)(1) Guidelines promulgated by the U.S. E.P.A. While the Corps is the ultimate decision maker regarding compliance with the 404(b)(1) Guidelines, the Corps gives substantial weight to comments from E.P.A. in its evaluation of compliance with these requirements. Two critical issues Cargill will need to address regarding compliance with the 404(b)(1) Guidelines will be the alternatives analysis and the requirement not to cause or contribute to significant degradation.

While it is premature for the Corps to make any determinations regarding either of these issues, we can offer the following guidance to assist Cargill in developing its analysis of these issues. Regarding the alternatives analysis, an important threshold issue concerns whether the site at issue is a special aquatic site. If a project involves discharges to special aquatic sites, such as wetlands, there is a presumption that practicable, alternative sites are available. The presumption does not apply to permits that do not involve discharges to such sites. Based on your consultant's June, 2002, *Special Aquatic Habitat Assessment*, it appears that wetlands and other special aquatic sites are not present on the Redwood City Plant Site. We encourage Cargill to further develop its analysis of this issue so that all parties interested in the evaluation of this permit decision have a clear understanding of how the alternatives analysis will need to be framed.

With regard to significant degradation, the 404(b)(1) guidelines and relevant interagency policy statements call for project proponents to take practicable steps to avoid and minimize impacts to the aquatic ecosystem, and then provide compensatory mitigation to address remaining impacts. In developing its proposal for the Redwood City Plant Site, Cargill should focus its development plans on the more severely disturbed portions of the site and on those portions of the site closest to existing development. In developing compensatory mitigation proposals, Cargill should consider the policy preferences expressed in relevant agency policy statements, which establish a preference for on-site, in kind compensatory mitigation. Portions of the Redwood City Plant Site have substantial potential for such restoration and would appear to provide significant opportunities for such compensatory mitigation.

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I hope that you find this guidance useful in your development of a project proposal. Please contact Bob Smith of our Regulatory Branch (415-977-8450) if you have further questions.

Sincerely,



Timothy S. O'Rourke
Lieutenant Colonel, Corps of Engineers
District Engineer

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USEPA Region IX